IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No.

SAMUEL BERNSTEIN,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Courts Below.

There was no opinion rendered by the Trial Court relating to the within petitioner. The opinion of the Circuit Court below (R. 839), rendered on December, 1941, is still unreported.

II

Jurisdiction.

A

The United States Circuit Court of Appeals for the Second Circuit made its order for mandate herein on December 17, 1941 (R. 844).

B

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Sec. 347, subd. a (Judicial Code, Sec. 240-a as amended), and Rule 38 of the revised rules (1939) of the Supreme Court of the United States.

C

The reasons stated in the preceding petition under II (pp. 7-8), herewith adopted and made part of this brief and believed to constitute good grounds for invoking jurisdiction of this Court.

III

Statement of the Case.

A statement of the case has been made in the preceding petition under I (pp. 1-7), which is hereby adopted and made a part of this brief.

IV

Specification of Errors.

A

The Circuit Court erred in holding that the Trial Court correctly permitted proof against the petitioner of criminal arrests and charges against the petitioner wholly unrelated to the crime charged in the indictment (Assignments of error No. 4 [R. 815] and No. 21 [R. 827]).

B

The charge and rulings on evidence by the Trial Court were so confusing that the petitioner was denied a fair trial upon the indictment (Assignments of error No. 14 [R. 821] and No. 20 [R. 825]).

Statutes Involved.

Title 21, U. S. C., Sec. 174:

> "If any person fraudulently or knowingly imports or brings in narcotic drugs into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than Five Thousand Dollars and imprisoned for not more than ten years. Whenever on trial for violation of this Section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the Jury."

Title 18, U. S. C., Sec. 550:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission is a principal."

ARGUMENT

A

The Circuit Court erred in deciding that the action of the Trial Court in permitting proof of unrelated arrests and criminal charges against petitioner, thereby putting his character in issue, did not constitute reversible error.

The crime charged did not involve proof of motive or intent. The petitioner did not testify. The decision of the Circuit Court, holding that proof of unrelated arrests

and criminal charges against the petitioner was proper, is in direct conflict with applicable law.

Boyd v. *United States,* 142 U. S. 450, 458 (1891).
Greer v. *United States,* 245 U. S. 559, 560 (1917).
Brown v. *United States,* 83 Fed. (2) 383 (C. C. A. 3, 1936).
Tedesco v. *United States,* 118 Fed. (2) 737 (C. C. A. 9, 1941).
Tinsley v. *United States,* 43 Fed. (2) 890 (C. C. A. 8, 1930).
Eley v. *United States,* 117 Fed. (2) 526 (C. C. A. 6, 1941).
Hilliard v. *United States,* 121 Fed. (2) 992 (C. C. A. 8, 1941).
Mackreth v. *United States,* 103 Fed. (2) 495 (C. C. A. 5, 1939).

B

The rulings on evidence and the charge of the Trial Court which misinterpreted the indictment and the statute upon which it was based were so confusing that petitioner was denied a fair trial.

The Court charged (R. 752):

> " * * * The product as so treated, then had to get into circulation.
>
> Now the traffic in narcotics is like a legitimate enterprise. It is not sufficient that any articles in trade or commerce be manufactured. They must not only be manufactured but they must be sold. They must get into distribution; so you will see that the Government charges that these four defendants acting, some for one purpose and some for another, handled this acquisition of supplies, to fabricate a new substance and the distribution of the new substance, a completed thing. That is what the Government charges."

This definition and interpretation of the indictment was erroneous, confusing and prejudicial. Under these instructions the Court in effect stated that the crime charged was not only concealment or possession, but conspiracy, illegal manufacture and illegal sale of narcotics.

The jury was thus permitted to find that even if the defendant aided and abetted in the illegal manufacture of narcotics, in an illegal sale, without possession or concealing any drugs, or that he conspired to commit these crimes, he could be found guilty.

The Court had instructed the jury that the crime involved was one "well rounded enterprise" (R. 753), yet it refused to give instructions appropriate to base the guilt or innocence of the defendants on whether or not it was one enterprise (R. 827).

It was inevitable therefore that the jury was confused and could not clearly decide the issue of fact on the law as presented by the Court. This was highly prejudicial to the defendant.

The Court had admitted into evidence acts of the other defendants and of other persons, which acts were done without the knowledge or consent of the petitioner. Evidence of these acts would be admissible if a conspiracy were proved in fact although not charged in the indictment. The jury could only find a conspiracy in fact if it found that all the defendants acted jointly. If it found that there was no conspiracy in fact the acts of the other defendants were inadmissible against the petitioner Bernstein.

The Court's position was that of allowing the jury to consider all of the acts of all of the defendants against petitioner even though these acts were unconnected with him. It allowed an attempt by the prosecution to prove a conspiracy in fact, yet in substance it instructed the jury that even if these defendants were unconnected in their criminal activities, or were not acting jointly, it could nevertheless consider all of their acts against every other defendant.

Though concededly the circumstances in the instant case were suspicious, there was no requisite proof of illegal sale or illegal manufacture.

Hence, even the Court's reference to these crimes in its charge was highly prejudicial. The portions of the charge above quoted were a series of vague and uncertain interpretations of other crimes without adequate proof.

While proving the crime charged in the indictment it might have been proper to prove incidental crimes. However, the Court in its charge tacitly admitted that proof of the crime charged in the indictment was incidental to other possible crimes not actually charged. This could only serve to base a conviction upon factors not in issue.

CONCLUSION

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

Respectfully submitted,

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Counsel for Petitioner.